FOR ARGUMENT

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No. 97-569

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

BURLINGTON INDUSTRIES, INC.

Petitioner,

v.

KIMBERLY B. ELLERTH

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT KIMBERLY B. ELLERTH

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March 30, 1998

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QUESTION PRESENTED FOR REVIEW

I. Whether a claim of quid pro quo sexual harassment may be stated under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION 1

II. SUMMARY OF ARGUMENT 2

A. IMPOSING STRICT LIABILITY ON EMPLOYERS FOR QUID PRO QUO HARASSMENT OF SUPERVISORS WITHOUT REQUIRING A SHOWING OF TANGIBLE DETRIMENT TO THE EMPLOYEE IS THE RULE MOST CONSISTENT WITH THE LANGUAGE AND INTENT OF TITLE VII. 5

B. THE PREVALENT AND BETTER-REASONED RULE AMONG THE CIRCUIT COURTS IMPOSES STRICT LIABILITY UPON AN EMPLOYER FOR ACTS OF A SUPERVISOR THAT AMOUNT TO *QUID PRO QUO* SEXUAL HARASSMENT. 12

C. CLARIFYING THAT THE STANDARD FOR SEXUAL HARASSMENT LIABILITY UNDER TITLE VII DEPENDS UPON THE SUPERVISORY CAPACITY OF THE HARASSER, AND NOT UPON THE NATURE OF THE CONDUCT ALLEGED, WILL BRING ORDER AND

PREDICTABILITY TO TITLE VII JURISPRUDENCE. 16

IV. CONCLUSION 18

TABLE OF AUTHORITIES

Case **Page(s)**

Arkansas Educational Television Comm. v. Forbes, Sup.Ct. No. 96-779 (October term, 1996) 2

Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir. 1986) 10

Bouton v. BMW of North America, 29 F.3d 103 (3d Cir. 1994) 15

Bryson v. Chicago State University, 96 F.3d 912 (7th Cir. 1996) 11, 15

Caribbean v. Columbia University, 14 F.3d at 777 5

Carrero v. New York City Hous. Auth., 890 F.2d 569 (2d Cir. 1989) 12, 13

Chamberlin v. 101 Realty, 915 F.2d 777 (1st Cir. 1990) . . 9, 12-14

Davis v. City of Sioux City, 115 F.3d 1365 (8th Cir. 1997) 12

Davis v. City of Sioux City, supra, 115 F.3d at 1368 15

Ellerth v. Burlington Industries, Inc., 123 F.3d 490, 494 (1997) 5, 11, 16

Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995) 12, 15

Harris v. Forklift Systems, 510 U.S. 17 (1993) 8, 9

Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997) 6, 8, 12, 14

Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) 13, 14

Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987) 9

Highlander v. KFC, 805 F.2d 644 (6th Cir. 1986) 9, 13

Jansen v. Packaging Corp. of America, 123 F.3d 488 (7th Cir. 1997) 9-11

Jones v. Flagship International, 793 F.2d 714 (5th Cir. 1986) 9

Karibian v. Columbia Univ., 14 F.3d 773 (2d Cir.) ... 6, 10, 12, 13

Kauffman v. Allied Signal, Inc., 970 F.2d 178 (6th Cir. 1992) 12

Kotcher v. Rosa and Sullivan Appliance Center, Inc., 957 F.2d 59 (2d Cir. 1992) 13

Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13 (1978) 3

Martin v. Cavalier Hotel Corp., 48 F.3d 1343 (4th Cir. 1995) 12, 15

Meritor Savings Bank, F.S.B. v. Vinson, 477 U.S. 57 (1986) 2-4, 6-8, 12, 14

Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994) 11, 12

Oncale v. Sundowner, U.S. (March 4, 1998), Sup.Ct. No. 96-568 (1998 WL 88039) 4

Reid v. O'Leary, No. CIV.A. 96-401 (GK)(D.C.Cir. 1996)(1996 U.S.Dist. LEXIS 10627) 10

Reinhold v. Commonwealth of Va., No. 96-2816, 1998 WL 45247, at *12 (4th Cir. Feb. 6, 1998) 6, 7

Sauers v. Salt Lake County, 1 F.3d 1122 (10th Cir. 1993) 12

Sparks v. Pilot Freight Carriers, 830F.2d 1554 (11th Cir. 1987) 9, 13

Spencer v. GE, 894 F.2d 651 (4th Cir. 1990) 9

Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311 (11th Cir. 1989) 13

Tomka v. Sailor Corp., 66 F.3d 1295 (2d Cir. 1995) 10

Torres v. Pisano, 116 F.3d 625 (2d Cir. 1997) 12

Statues, Regulations and Rules

110 Cong. Rec. 2577-2584 (1964) 2

1964 Civil Rights Act 3

29 C.F.R. Sec. 1604.11(f) 16

42 U.S.C. Secs. 2000e-2(a)(1) 2

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e i-5, 8, 9

U.S. Constitution, Fourteenth Amendment 2

Other Sources

Bernstein, Anita, *Treating Sexual Harassment with Respect*, 111 Harv. L. Rev. 445 (1997) 8

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No. 96-779

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

BURLINGTON INDUSTRIES, INCORPORATED

Petitioner,

v.

KIMBERLY B. ELLERTH

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT KIMBERLY B. ELLERTH

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION

The Rutherford Institute is a non-profit organization established in 1982 and based in Charlottesville, Virginia,

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** The parties have consented to the filing of this brief. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

providing legal services nationwide in defense of civil and religious liberties. The Institute has appeared numerous times before this Court on such matters, most recently as counsel of record for Respondent in *Arkansas Educational Television Comm. v. Forbes,* Sup.Ct. No. 96-779 (October term, 1996)..

II. SUMMARY OF ARGUMENT

In the wake of the peaceful anti-segregation protests in the late 1950's and early 1960's, *e.g.*, restaurant sit-ins and bus boycotts, the 1964 Civil Rights Act was enacted to do what the Reconstruction era Fourteenth Amendment could not completely do - "eliminate all badges of slavery" - because the Amendment applied only to governmental agents, not private actors. Title VII of the Act was intended to achieve equality in employment opportunities through the eradication of discriminatory barriers in the workplace.

Title VII renders it unlawful for any public or private employer with more than fifteen employees to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin. . . ."[1]

The bill creating Title VII was originally targeted at racial discrimination, and the prohibition on gender-based discrimination was added on the floor of the House.[2] Consequently, virtually no legislative discussion of the intent and scope of the prohibition on gender discrimination exists, and this area of law has been almost entirely developed by the

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[1] 42 U.S.C. Secs. 2000e-2(a)(1).

[2] *See* 110 Cong. Rec. 2577-2584 (1964), and discussion in *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57, 63-64 (1986).

courts.[3]

Prior to 1986, courts differed on whether sexual *harassment* in the workplace was a form of sex discrimination outlawed by Title VII. The U.S. Supreme Court put the debate to rest in 1986 in *Meritor Savings Bank v. Vinson*,[4] by holding that sexual harassment claims could be brought under Title VII. The Court did so by first observing that sexual harassment was a type of gender-based discrimination: "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex.[5] The Supreme Court next rejected the argument that in passing the 1964 Civil Rights Act, Congress was only concerned with "tangible losses of an economic character" and not "purely psychological aspects of the workplace environment."[6] The Court stated that "[t]he phrase, 'terms, conditions, or privileges of employment' evinces a congressional intent '"to strike at the entire spectrum of disparate treatment of men and women"' in employment."[7] The Court concluded:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual

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[3] *Id.*

[4] 477 U.S. 57 (1986).

[5] 477 U.S. 64.

[6] *Id.*

[7] *Id.* (cites omitted), quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978).

> equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or a woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.[8]

The Supreme Court continued its broad and liberal reading of Title VII recently in *Oncale v. Sundowner*, __ U.S. __ (March 4, 1998), Sup.Ct. No. 96-568 (1998 WL 88039) by holding that Title VII's prohibition on discrimination "because of sex" extends to harassment between members of the same sex. "[M]ale-on-male sexual harassment was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* The Court is now called upon to determine whether supervisor threats of retaliation, although unfulfilled, constitute an "arbitrary barrier to sexual equality at the workplace" in contravention of Title VII. *Meritor*, *supra*, at n. 8.

Amicus curiae The Rutherford Institute respectfully submits that the better reasoned rule among the Circuit Courts of Appeal imposes strict liability upon employers for the acts of their supervisory employees which amount to *quid pro quo* sexual harassment, without requiring a showing of tangible job detriment suffered by the employee. This approach is consonant with the language and intent of the proscriptions

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[8] *Id.* at 67, quoting *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982).

against gender discrimination of Title VII, and offers the Court the opportunity to, in the words of the *en banc* Eighth Circuit Court of Appeals, "bring order to the chaotic case law in this important field of practice"[9] by clarifying that one rule of liability - strict liability - pertains when the harasser is the employee-victim's supervisor.

III. ARGUMENT

A. IMPOSING STRICT LIABILITY ON EMPLOYERS FOR QUID PRO QUO HARASSMENT OF SUPERVISORS WITHOUT REQUIRING A SHOWING OF TANGIBLE DETRIMENT TO THE EMPLOYEE IS THE RULE MOST CONSISTENT WITH THE LANGUAGE AND INTENT OF TITLE VII.

For analytical purposes, courts determine liability of employers according to two types of sexual harassment, *quid pro quo* harassment and hostile work environment harassment. The predominate method for analyzing *quid pro quo* and hostile work environment harassment causes of action is to analyze each cause of action separately, applying strict liability in *quid pro quo* causes and agency principles to the hostile environment causes.[10]

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[9] *Ellerth v. Burlington Industries, Inc.*, 123 F.3d 490, 494-95 (1997).

[10] This method of analysis is exemplified in *Caribbean v. Columbia University*, in which the Second Circuit began by holding that the *quid pro quo* harasser subjects his employer to strict liability. 14 F.3d 773, 777 (2nd Cir. 1997). The court further held that only the plaintiff's hostile

(continued...)

Insofar as no two broad categories can suffice to encompass all workplace scenarios, it may be more helpful to regard the Court's intent in *Meritor* to treat them as the predominant paradigms of harassment, rather than as discrete categories. As courts have frequently noted, "Hostile environment and *quid pro quo* harassment causes of action are not always clearly distinct and separate,"[11] and many cases require analysis of the employee's claims under both standards.

Quid pro quo harassment occurs "where specific benefits of employment are conditioned on sexual demands by the victim's supervisor." *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1443 (10th Cir. 1997). In a *quid pro quo* harassment case, a supervisor either expressly or impliedly makes an employee's access to her tangible job benefits contingent upon acquiescence to the harasser's sexual demands. *See Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir.); "*Quid pro quo* sexual harassment occurs when an employer conditions, explicitly or implicitly, the receipt of a job benefit or a tangible job detriment on the employee's acceptance or rejection of sexual advances." *Reinhold v. Commonwealth of Va.*, No. 96-2816, 1998 WL 45247, at 12 (4th Cir. Feb. 6,

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[10](...continued)
work environment claims were to be analyzed under common law principles of agency as directed by *Meritor*. Id. at 779-780. *See also, Torres v. Pisano*, 116 F.3d at 625, at 633-634 (2nd Cir. 1997); *Harrison*, 112 F.3d at 1443-1448; *Gary v. Lon* 59 F.3d 1391, 1395-1399 (D.C. Cir. 1995); *Kauffman v. Allied Signal*, 970 F.2d 178, at 181-187 (6th Cir. 1992); *Kotcher*, 957 F.2d 59, 62-63 (2d Cir. 1992); *Hicks v. Gates*, 833 F.2d 966, 1413-1418 (10th Cir. 1991).

[11] *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989).

1998). Thus, in a *quid pro quo* cause of action, the relevant inquiry is "whether the supervisor has linked tangible job benefits to the acceptance or rejection of sexual advances." *Id.* Sec. 778. In other words, the issue is whether the "supervisor used the employee's acceptance or rejection of his advances as the basis for a decision affecting the compensation, terms, conditions or privileges of the employee's job." *Id.* In contrast, in a hostile work environment sexual harassment situation, the "sexual conduct has the purpose or effect of unreasonably interfering with an individual's work or performance or creating an intimidating, hostile, or offensive working environment." *Meritor*, 477 U.S. at 65. The Court in *Meritor* declined to adopt a rule that would render employers automatically liable for sexual harassment by their supervisors in a hostile work environment cause of action, instead directing lower courts to consult agency principles for guidance on the issue of employer liability.[12] The Court reasoned that because Title VII's definition of "employer" includes any "agent" of the employer, Congress intended to apply agency principles when determining the scope of an employer's liability for sexual harassment. *Id.* Thus, the Court suggested that the issue of employer liability be determined with reference to agency principles. *Id.* However, the Court did not specify whether the lower courts should refer to agency principles only in hostile work environment cases or in *quid pro quo* cases as well. This issue has been left for the circuit courts to determine.

In response, courts treat these two categories of

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[12] *Id.* at 472-73. The *Meritor* Court recommended that the lower courts refer to sections 219-237 of the Restatement of Agency. These sections are found in Chapter Seven, Topic Two, Title B of the Restatement entitled, "Liability of Principal to Third Persons - Liability for Authorized Conduct or Conduct Incidental Thereto - Torts of Servants." Restatement (Second) of Agency Secs. 219-237 (1958).

harassment differently when determining the standard for an employer's liability. *Harrison*, 112 F.3d at 1443. "In cases involving *quid pro quo* harassment, courts routinely hold, with little or no discussion, that the employer is 'strictly liable' for the supervisor's wrongful conduct." *Id.* "There is little controversy regarding the effect of *quid pro quo* harassment by supervisors; in *quid pro quo* harassment cases, courts readily impose liability on the employer without regard to the agency issues." David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by their Supervisors*, 81 Cornell L. Rev. 66, 71 n. 32 (1995); *see also* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 Harv. L. Rev. 445, 496 (1997). It is predominantly in hostile environment harassment cases that courts follow *Meritor*'s directive and engage in lengthy analyses regarding common law agency principles.

The nature of *quid pro quo* harassment requires a context of a harassing act or acts committed directly by or at the direction of a supervisory employee, rather than a co-worker. A supervisor's clear threat (whether implied or explicit) to withhold job benefits or impose job detriments on an employee depending upon her accession to his sexual desires is an arbitrary barrier to sexual equality in the workplace, and should thus be considered to be within the scope of evils Title VII was designed to "strike at the heart of . . ." *Meritor*, 477 U.S. at 64. An examination of the cases in this area leads to the clear conclusion that employees suffer harm on the job upon the making of such demands, not upon their response. A clear *quid pro quo* demand immediately impairs the victim-employee's motivation and poisons her workplace environment, thereby affecting the "terms and conditions" of her employment.

The Court in *Harris v. Forklift Systems*, 510 U.S. 17, 22

(1993), affirmed that compensation for subjective emotional distress is recoverable under Title VII in the context of hostile work environment claims by recognizing that "A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourages employees from advancing in their careers." *Id.* at 370-71. For this reason, numerous cases relied upon by Petitioner and its *amici* for their assertion that tangible job detriment is required for a finding of *quid pro quo* harassment are inapposite because they predate the 1991 amendments to Title VII, when only equitable relief such as back pay and reinstatement -- but not noneconomic compensatory damages for emotional distress - was available to prevailing plaintiffs. *Highlander v. KFC*, 805 F.2d 644 (6th Cir. 1986); *Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986); *Sparks v. Pilot Freight Carriers*, 830F.2d 1554 (11th Cir. 1987); *Chamberlin v. 101 Realty*, 915 F.2d 777 (1st Cir. 1990); *Spencer v. GE*, 894 F.2d 651 (4th Cir. 1990); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987). "In that context, it arguably made sense to require some realized adverse action. Now that emotional damage is compensable, the scope of *quid pro quo* should encompass clear unfulfilled threats that cause serious emotional harm." *Jansen*, 123 F.3d at 488 (plurality opinion).

The Court's unwillingness in *Harris* to rule out the possibility that one particularly egregious act of harassment could create a hostile work environment[13] seems predicated on this same principle. Several of the Circuits Courts have also

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[13] 510 U.S. at 23 (whether environment is hostile can be determined only by examination of all circumstances, including, *inter alia*, "the frequency of the discriminatory conduct").

recognized this view. *E.g., Tomka v. Sailor Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995)("even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability."); *Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986) ("[a]s a general matter, a single discriminatory act against one individual can amount to intentional discrimination for equal protection purposes);" *Reid v. O'Leary*, No. CIV.A. 96-401 (GK)(D.C.Cir. 1996)(1996 U.S.Dist. LEXIS 10627).

In light of these principles, the issue of whether *quid pro quo* liability should be found absent tangible job detriment should be examined from the standpoint of the employee whom Title VII primarily seeks to protect. When a demand for submission to sexual favors is made, the employee-victim has two choices, to submit or resist (reporting the threat may be considered a form of resistance). However, she has no way of knowing what the outcome of her course of action will be in either case, since power over the terms and conditions of her employment remains solely in the hands of her supervisor in either case. The harassing supervisor's authority places a broad range of potential rewards and punishments at his disposal. Rewards for submission may take the form of any number of the following, or a pattern or combination of them: more lenient job assignments or working hours; enhanced performance reviews; and advances in position, compensation or title. *E.g., Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir. 1994)(A supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation); *Jansen v. Packaging Corp. of America*, 123 F.3d 490 (7th Cir. 1997)(Supervisor says to his secretary, "I haven't forgotten your [performance] review, it's here on my desk," while patting

his crotch). Likewise, punishments may take the form of a number of potential negative consequences, or a pattern or combination of them: burdensome increases in the employee's workload or changes in the employee's tasks; detrimental performance reviews; and demotions, suspensions or stripping of titles and responsibilities. *E.g., Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994)(Supervisor in post office repeatedly demanded and obtained oral sex from a deaf-mute postal employee over a period of six months; plaintiff submitted because she feared losing her job and did not know how she could get another); *Bryson v. Chicago State University*, 96 F.3d 912 (7th Cir. 1996)(Plaintiff university professor alleged that Provost made sexual overtures toward her, threatening, "you had better do what I say or you're going to be sorry.").

Abusive supervisors rarely exhibit isolated instances of either the "carrot" or the "stick" approach; typically, a combination of both are used, as the employee alternately submits and resists depending upon the severity of the consequences and the degree of control the supevisors wields. The abusive supevisor is not concerned with advancing the employee-victim's career, but with self-gratification; consequently, he may withhold promised favors even after the employee submits, or may arbitrarily punish the employee despite her acquiescence in his demands. In some cases, he may even permit the resisting employee to advance because he fears the potential consequences that retribution may pose to his own career prospects. *E.g, Jansen v. Packaging Corp. of America, supra; Ellerth v. Burlington Industries, Inc.*, 123 F.3d 490, 494-95 (1997). The employee-victim, on the other hand, remains powerless in all situations. She cannot predict the outcome of her submission or resistance to her supervisor's demands, which remains in his hands alone; and she cannot "enforce" a *quid pro quo* "contract" for career favors procured

by her submission. It is the threat of withholding job favors or imposing retaliation that places the employee in the position of making this Hobbesian choice, and consequently it is these tyes of demands that the provisions of Title VII should be construed to "strike at the heart of".

B. THE PREVALENT AND BETTER-REASONED RULE AMONG THE CIRCUIT COURTS IMPOSES STRICT LIABILITY UPON AN EMPLOYER FOR ACTS OF A SUPERVISOR THAT AMOUNT TO *QUID PRO QUO* SEXUAL HARASSMENT.

An analysis of the standard for *quid pro quo* liability should begin with the recognition that, regardless of the rationale employed, the Crcuit Courts of Appeal that have addressed the issue have held, by and large, that employers are strictly liable for *quid pro quo* sexual harassment. *See Meritor*, 477 U.S. at 75 (J. Marshall, concurring)("[E]very Court of Appeals that has considered this issue has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to the subordinate employee."). *See also Torres v. Pisano*, 116 F.3d 625, 633 (2d Cir. 1997); *Davis v. City of Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d at 1443; *Gary v. Long*, 59 F.3d 1391, 1395-96 (D.C. Cir. 1995); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 n. 3 (4th Cir. 1995); *Nichols v. Frank*, 42 F.3d 503, 513 (9th Cir. 1994); *Karibian, supra,* 14 F.3d at 777; *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir. 1992); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 785 (1st Cir. 1990); *Carrero v. New York City Hous.*

Auth., 890 F.2d 569, 579 (2d Cir. 1989); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1564 n. 22 (11th Cir. 1987); *Highlander v. KFC Nat'l Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986); *Henson v. City of Dundee*, 682 F.2d 897, 909-910 (11th Cir. 1982).

The rationale by which courts apply *respondeat superior* to establish *quid pro quo* liability varies. *See* Rachel E. Lutner, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. Ill. L. Rev. 589, 602 (1993). Some courts call employer liability in the *quid pro quo* context a form of *respondeat superior*, while others rely on the Restatement of Agency principles. *See, e.g., Nichols, supra*, 42 F.3d at 514 ("Under traditional agency principles, the exercise of such actual or apparent authority gives rise to liability on the part of the employer under a theory of *respondeat superior.*"); *Chamberlin, supra*, 915 F.2d at 784 (describing as one of the elements of a viable *quid pro quo* harassment claim that, "respondeat superior has been established").

Corts utilizing the *respondeat superior* rationale hold that employers are liable for the *quid pro quo* harassment of their supervisors because the "supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee. From the perspective of the employee, the supervisor and the employer merge into a single entity." *Karibian*, 14 F.3d at 780; *See also Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59, 62 (2d Cir. 1992); *Carrero*, 890 F.2d at 579; *Steele*, 867 F.2d at 1316 (explaining that an employer is strictly liable for the supervisor's *quid pro quo* harassment because the supervisor, "by definition, acts as the company"). Similarly, in *Highlander*

v. KFC Nat'l Management Co., the Sixth Circuit held that *respondeat superior* is used to hold an employer strictly liable for the conduct of supervisory employees having plenary authority to hire, fire, promote, and discipline. 805 F.2d at 648. In other words, the strict liability stems from the harasser's authority, not from his actions. Lutner, *supra*, at 602 n. 110.[14]

Other courts have referred to common law agency principles set forth in the Restatement in their brief analyses. Section 219 of the Restatement of Agency reads, "(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment. (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (d) ... he was aided in accomplishing the tort by the existence of the agency relation." Restatement (Second) of Agency Secs. 219(1) & (2)(d) (1958). Before *Meritor*, the Eleventh Circuit in *Henson v. City of Dundee* referred to Restatement Section 219(2)(d) to explain its rationale for subjecting the employer to strict liability for *quid pro quo* harassment. 682 F.2d at 910 n. 21. The court reasoned that because the supervisor used the means furnished to him by the employer to extort sexual consideration from the employee, he was "aided in accomplishing the tort by the existence of the agency relation." *Id.*, quoting Restatement (Second) Agency Sec. 219(2)(d). Accord *Harrison v. Eddy Potash, Inc., supra*, 112 F.3d at 1443 (strict liability rule justified as "presumably rests[ing] upon the fact that the supervisor was acting within the scope of his actual or apparent authority when he

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[14] *But cf. Chamberlin v. 101 Realty, Inc.*, in which the First Circuit analyzed the strict liability rule under a slightly different theory, holding that *respondeat superior* stems from a finding of tangible job detriment to the harassed employee because an employer is strictly liable for the actions of its supervisors that constitute sexual harassment. 915 F.2d at 785; Lutner, *supra*, at 602, n. 110.

committed the harassment, . . . or because the supervisor 'was aided in accomplishing the [harassment] by the existence of the agency relation," *see* Restatement (Second) of Agency Sec. 219(1) & (2)(d); *Bouton v. BMW of North America*, 29 F.3d 103, 106-07 (3d Cir. 1994) ("Scope-of-employment liability is often involved in *quid pro quo* cases because the supervisor has used his authority over the employee's job to extort sexual favors. Without the agency relationship, *quid pro quo* harassment would be impossible."); *Davis v. City of Sioux City, supra*, 115 F.3d at 1368. *Martin v. Cavalier Hotel Corp., supra* at 1353; *Nichols, supra*, 42 F.3d at 514.

Notably, even in applying agency principles to hostile work environment claims pursuant to *Meritor*, several Circuit Courts impose strict liability upon the employer for harassment caused by supervisory employees. *See* Bernstein, *supra*, at pp. 599-600.

Where strict liability of the employer is established, no showing of tangible job detriment is necessary. Proof of tangible job detriment has generally been required by the Circuit Courts only where the issue before the court is whether threats and conduct of a supervisor may be attributed to the employer under agency principles. *E.g., Gary v. Long, supra.* Rather than examining the record for some form of objective job detriment suffered by the employee, however subtle, *e.g., Bryson v. Chicago State*, 96 F.3d 912 (7th Cir. 1996)(removal from faculty committee sufficient tangible detriment), the more workable rule would assume strict liability for the employer where the harassing employee had authority to alter the terms and conditions of the employee's workplace, and evidence is adduced that he used that authority to demand submission to sexual desires as a condition of receiving favors or avoiding sanctions.

C. CLARIFYING THAT THE STANDARD FOR SEXUAL HARASSMENT LIABILITY UNDER TITLE VII DEPENDS UPON THE SUPERVISORY CAPACITY OF THE HARASSER, AND NOT UPON THE NATURE OF THE CONDUCT ALLEGED, WILL BRING ORDER AND PREDICTABILITY TO TITLE VII JURISPRUDENCE.

The case before the Court presents the Justices with the opportunity of integrating the *quid pro quo* and hostile workplace standards of liability in cases where a supervisor is the source of the harassment. A rule applying strict liability to employers in all cases in which the harasser acts in a supervisory capacity by holding the authority to alter the terms and conditions of the employee's workplace, whether for *quid pro quo* demands or generalized inappropriate sexual behavior, would do much to "bring order to the chaotic case law"[15] in this area. *Amicus* submits that such a rule of liability would also further compliance with employers' obligations under Title VII to "take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned."[16]

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[15] *Ellerth v. Burlington Industries, Inc.*, 123 F.3d 490, 494-95 (1997).

[16] Equal Employment Opportunity Commission, "Guidelines on Discrimination Because of Sex," 29 C.F.R. Sec. 1604.11(f).

IV. CONCLUSION

For the reasons discussed herein, *amicus curiae* The Rutherford Institute respectfully suggests that the judgment of the Eighth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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[17] The Rutherford Institute wishes to thank the following law students for their invaluable assistance in researching and preparing this *amicus* brief:

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